LONG YAN FEI

v.

PAULS BAYA

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[DIVORCE PETITION NO: S2-33-366-1998]
25 JANUARY 1999

FAMILY LAW: *Divorce - Jurisdiction of court - Domicile of parties - Respondent husband resident in Sarawak - Whether High Court in Malaya has jurisdiction to hear wife's petition - Whether sufficient for both parties to be domiciled in Malaysia - Law Reform (Marriage & Divorce) Act 1976, ss. 48(1)(c) & 49(1)(b)*

The petitioner (the wife) and the respondent were married at the Bintulu Marriage Registry in Sarawak and had cohabited in Kuala Lumpur. After differences occurred, the respondent moved to Kuching whilst the petitioner continued to reside in Kuala Lumpur. Pursuant to an order of the High Court in Malaya at Kuala Lumpur, the petitioner obtained an injunction against the respondent as well as guardianship, care and control of the child, aged five. The petitioner thereafter referred the matter to a marriage tribunal, but on each of the five different appointments the respondent failed to appear.

After being served the necessary papers, the respondent raised the preliminary objection that the petition should be struck out on the basis that the High Court in Malaya had no jurisdiction to hear the petition since the respondent resided in Sarawak, and that the correct local and territorial jurisdiction laid with the High Court in Sabah & Sarawak because the respondent was domiciled in Sarawak.

Held:

[1] Section 24 of the Courts of Judicature Act 1964 was relevant to this case. It provides that the civil jurisdiction of the High Court includes jurisdiction under any written law relating to divorce and matrimonial causes.

[2] Section 48(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') provides that when parties seek a decree of divorce, both parties to the action must be domiciled in Malaysia. Both the petitioner and the respondent were domiciled in Malaysia when the petition was presented.

[3] Section 49(1) of the Act provides an additional protection to a wife. Under s. 49(1)(b) of the Act, the petitioner who had been resident in Kuala Lumpur for a period of two years immediately preceding the commencement of the proceedings had a right to proceed with this petition. Even if the respondent had now taken up residence in Kuching, this court was not estopped by a plea of lack of jurisdiction to hear the petition.

[Preliminary objection dismissed.]

Case(s) referred to:
Re David Lim Hong Kee, ex p Perwira Habib Bank Malaysia Bhd [1995] 4 CLJ 627 ***(dist)***

Legislation referred to:
Bankruptcy Act 1967, s. 5(1)(d)
Bankruptcy Rules 1969, r. 101(2)
Courts of Judicature Act 1964, ss. 3, 23(1), 24
Federal Constitution, art. 121
Law Reform (Marriage and Divorce) Act 1976, ss. 48(1), (2), 49(1)

For the petitioner - Godfrey Thomas Fernandez; M/s Azlin, Alahakone & Assocs
For the respondent - Shamsul Nur Aqmar Shamsul Bahrain (John Clarke with her); M/s Rusmah Arunan & Assocs

Reported by Farah Naim

JUDGMENT

RK Nathan J:

Facts

The petitioning wife, a school teacher, was lawfully married to the respondent at the Bintulu Marriage Registry in Sarawak. Both parties had cohabited at an address in Kuala Lumpur (the matrimonial home). After unhappy differences had occurred, and about seven years after their marriage, the respondent moved to Kuching to live and to work there, whilst the petitioner continued to reside in Kuala Lumpur. The parties have a daughter, presently five years old. She is now in the custody of the mother, pursuant to an order of court, dated 5 November 1997, obtained pursuant to an originating summons filed at the High Court at Kuala Lumpur, whereby she obtained an injunction against the respondent and guardianship, custody and care and control of the child. The petitioner had referred the matter to the marriage tribunal and on each of the five different appointments that were fixed, the respondent failed to attend.

The Preliminary Objection

The respondent being duly served with the necessary papers has filed an Answer stating that he wishes to raise a preliminary objection relating to the jurisdiction of this court to hear the petition.

The preliminary objection is that the said petition should be struck out on the grounds that the High Court of Malaya has no local or territorial jurisdiction to hear the petition, and that the local and territorial jurisdiction lies with the High Court of Sabah and Sarawak. In his Answer to the petition the respondent has contended that the reason why this petition should be filed in Sarawak is because the respondent is domiciled in Sarawak (East Malaysia) and not in West Malaysia.

Findings Of The Court

Article 121 of the Federal Constitution merely states that there are two High Courts of co-ordinate jurisdiction and status, namely the High Court of Malaya and High Court of Borneo, which shall have its registry in Sabah and Sarawak. Incidentally, s. 3 of the Courts of Judicature Act 1964 (CJA) also gives the same definition to a High Court. The said section also defines local jurisdiction as:

> (a) in the case of the High Court of Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur; and
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> (b) in the case of the High Court in Sabah and Sarawak, the territory comprised in the States of Sabah, Sarawak and the Federal Territory of Labuan.

It is also pertinent to reproduce s. 23 of the CJA which reads:

> 23. Civil jurisdiction – general.
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> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where –
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> (a) the cause of action arose, or
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> (b) the defendant or one of several defendants resides or has his place of business, or
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
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> (d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

Section 24 of the CJA is also relevant. It reads:

24. Civil jurisdiction – specific.

Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include –

(a) **jurisdiction under any written law relating to divorce and matrimonial causes;** (emphasis provided)

The respondent referred to my decision in *Re David Lim Hong Kee, ex parte Perwira Habib Bank Malaysia Berhad* [1995] 4 CLJ 627 wherein I had held that since the debtor was resident in Tawau, the bankruptcy petition ought to have been filed in Tawau and not in Kuala Lumpur. In that case I had held that there was no evidence before the court as to whether the debtor carried on business in Tawau or in Kuala Lumpur. All that the petition stated was that the debtor's place of residence was in Tawau. In bankruptcy cases the bankruptcy rules play a significant role. Rule 101 of the Bankruptcy Rule reads:

(1) The petition shall be filed in the Court in which it is to be presented.

(2) Where the debtor has for the greater part of one year immediately preceding the presentation of the petition carried on business in one State and resided in another State the petition may be filed in the Court of the State in which he has carried on business.

Whilst s. 5(1)(d) of the Bankruptcy Act 1967 talks of where the petition is to be presented, r. 101 relates to where the petition ought to be filed. It must be noticed as pointed out by me in *Re David Lim* that pursuant to the amendment PU(A)60/1993 the word "may" as stated in r. 101(2) has been substituted with the word "shall". But this rule relates to the debtor's place of business. In *Re David Lim* I went on to hold that because there was absolutely no evidence of the place of business of the debtor, r. 101(2) did not apply and therefore it was the duty of the petitioner to file the petition in compliance with the CJA. An appeal filed against the decision in *Re David Lim* has since been withdrawn.

The Law Reform (Marriage And Divorce) Act 1976

To my mind s. 24 of the CJA is most relevant. It states that without prejudice to s. 23, the High Court in the exercise of its civil jurisdiction, encompasses jurisdiction relating to matters **under any written law relating to divorce and matrimonial causes** (emphasis provided). This to my mind gives the rules sufficient prominence.

It is pertinent to refer to s. 48 of the Law Reform (Marriage and Divorce) Act 1976 (the Act) which reads as follows:

> 48. Extent of power to grant relief.
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> (1) Nothing in this Act shall authorise the court to make any decree of divorce except –
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> (a) where the marriage has been registered or deemed to be registered under this Act; or
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> (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
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> (c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

This section clearly states that when parties seek a decree of divorce, both parties to the action must be **domiciled** (emphasis provided) in Malaysia. It is not in dispute that both parties had their domicile in Malaysia when the petition was presented. Whilst it is clear at the time of filing the petition that the petitioner was resident in Kuala Lumpur and the respondent in Kuching, this does not detract from the fact that both Kuala Lumpur and Kuching are part of Malaysia and that therefore, both parties are domiciled in Malaysia. Therefore, on the basis of s. 48(1)(c) which recognises the extent of the power of the court to grant a decree of divorce where the domicile of the parties to the marriage at the time when the petition is presented is Malaysia, this preliminary objection must be dismissed.

It is also clear that the Act provides for additional protection for a wife. This is manifested by s. 49(1) of the Act which provides that:

> (1) Notwithstanding anything to the contrary in section 48(1)(c), the court shall have jurisdiction to entertain proceedings by a wife under this Part, although the husband is not domiciled or resident in Malaysia if –
>
> (a) ...
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> (b) the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings.

Therefore, even under s. 49(1)(b) of the Act, the petitioning wife who has been resident in Kuala Lumpur for a period of two years immediately preceding the commencement of the proceedings, has a right to proceed with this petition.

It is my judgment therefore that just because the respondent has now taken up residence in Kuching this court is not estopped by a plea of lack of jurisdiction, to hear this petition.

It is pertinent to note that s. 48(2)(c) stipulates that where the court is to make a decree of judicial separation then, and only then, does the question of the residence of both parties in Malaysia at the time of commencement of proceedings, comes into question. Even then this is a non issue in this case, since both East and West Malaysia form part of Malaysia.

In the circumstances, taking into consideration all matters raised by both parties, I hold that the preliminary objection be dismissed with costs.